DOCUMENT RESUME

ED 245 827 PS 014 414

AUTHOR Harper, Patricia
TITLE Children in Stepfamilies: Their Legal and Family Status. Institute of Family Studies Policy Background Paper No. 4.
INSTITUTION Institute of Family Studies, Melbourne (Australia).
REPORT NO ISBN-0-642-87666-5
PUB DATE Apr 84
NOTE 38p.
AVAILABLE FROM Editor, Institute of Family Studies, 766 Elizabeth Street, Melbourne 3000 Victoria, Australia (no price quoted).
PUB TYPE Viewpoints (120) -- Reports - Descriptive (141)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Adoption; *Child Custody; Court Litigation; Definitions; *Family Structure; Federal Legislation; Foreign Countries; *Social Change; Sociocultural Patterns; *Stepfamily
IDENTIFIERS Australia; *Blended Families; England

ABSTRACT

One of the features of Australian society during the past 25 years, from the late 1950s to the early 1980s, has been the changing nature of the family. Significant changes have occurred in family formation and breakdown; in family composition and structures; in family relationships; and in the status, rights, and obligations of family members. This paper (1) outlines some of these changes, directing particular attention toward implications for stepfamilies; (2) examines the arrangements some families have made, especially by using adoption, to clarify and establish the legal status and family relationships of children and stepparents; (3) outlines the options available in establishing legal status and family relationships in stepfamilies; and (4) recommends changes to legislation to overcome existing problems and provide a more appropriate means of establishing legal status and clarifying relationships within stepfamilies. It is proposed that stepparents be enabled to seek guardianship or custody rights but that adoption of stepchildren be abolished. (RH)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED245827

Children in Stepfamilies:

Their Legal and Family Status

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☐ This document has been reproduced as received from the person or organization originating it.

☒ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

Patricia Harper

PS 014414

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
Inst. of Family Studies
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

Children in Stepfamilies:

Their Legal and Family Status

Patricia Harper
Institute of Family Studies
Melbourne

PS 0144 14

Institute of Family Studies
Policy Background Paper No. 4
April 1984

© Institute of Family Studies — Commonwealth of Australia 1984

Institute of Family Studies
766 Elizabeth Street
Melbourne 3000 Australia
Telephone (03) 342 9100

National Library of Australia
Cataloguing-in-Publication data

Harper, Patricia.
Children in stepfamilies: their legal and family status.
Includes bibliographical references.
ISBN 0 642 87666 5.
1. Stepchildren – Legal status, laws, etc. – Australia.
I. Australia. Institute of Family Studies. II. Title.
(Series: Institute of Family Studies policy background paper; no. 4).

346.9401'7

Typeset by Bookset, Melbourne
Printed by Globe Press Pty Ltd
Designed by Lauren Statham

Contents

List of tables vi
Foreword vii
Synopsis 1

1 **Definitions** 2

2 **Changing family patterns** 4

3 **Trends in adoption** 6

4 **Adoption by step-parents** 8
Reasons for adoption 9
Effects of adoption 10
Objectives of legal arrangements affecting family members 11
Appropriateness of adoption 12
The attitude of the courts 14
Changing attitudes to step-parent adoptions 17

5 **Legal alternatives to adoption** 21
Legislative changes in England 21
Developing a framework for change in Australia 22
The implications for children in stepfamilies 24

6 **Recommendations for policy and legislative change** 26

List of references 28

Policy Background Papers

The Institute of Family Studies is a Commonwealth Statutory Authority established under the *Family Law Act* 1975. The Institute began operations in February 1980 and by the beginning of 1981 all staff positions had been filled. It is, first and foremost, a research and information dissemination organisation charged with conducting, encouraging and coordinating research into the factors affecting marital and family stability in Australia. As a result, the Institute has made the impact of public policies on the well-being of families a major focus of its research program.

The Policy Background Paper series is aimed at raising the level of public debate about major policy areas affecting families in Australia. At times they will be commissioned papers written by leading experts in each field; at others, they will be papers developed within the Institute in our effort to identify areas in need of further research and action.

The Institute hopes readers will respond in writing to the conclusions drawn and/or the policy proposals made. In this way we trust our Policy Background Paper series will contribute to a better understanding of the importance of a 'families perspective' in the development of policy.

Titles in the **Policy Background Paper** series are:

No. 1 Services to families: with many a slip
No. 2 Towards a national child care policy
No. 3 Marriage counselling services: priorities and policy
No. 4 Children in stepfamilies: their legal and family status

Copies of the above papers are available from the Editor, Institute of Family Studies, 766 Elizabeth Street, Melbourne 3000 Victoria, Australia.
Telephone (03) 342 9100.

List of tables

Table 1 Number of children in divorces and percentage distribution, 1975-82

2 Trends in step-parent adoptions

Foreword

This paper by Patricia Harper is a major policy paper in the broad area of 'family law'. We hope that it will generate widespread debate and point the way toward government policy change.

With a divorce rate of around 40 per cent for both first marriages and subsequent marriages, the number of children in stepfamilies has been rising. Our rough estimate is that in 1982 alone over 30000 children became stepchildren. The picture is complicated because there are no statistics from the Census on stepchildren, or from Family Court records on whether the children involved in divorce are stepchildren of one or other partner. It is further complicated by recent trends which suggest a decline both in the number of children in marriages ending in divorce and in the rate of remarriage after divorce.

Nonetheless, we know that many stepfamilies exist and that the adjustment process for parents and children is not easy. (The Institute has chosen to use the terms 'stepchildren' and 'stepfamilies', despite their Cinderella overtones, in preference to the terms 'blended' or 're-formed' families which are inappropriate when you try to convert them into a 'blended child' or a 're-formed child'.)

It is not our concern here to make any assertions about the nature and success or otherwise of families which include stepchildren. Our major study on 'Children in Families', just completed in the field, will tell us more accurately how children, including stepchildren, view the family they are in, and we shall publish later reports on this issue.

What this paper addresses is, rather, the way the law responds to define the changing rights and obligations of members of stepfamilies by examining the nature of family relationships and the legal status of children in stepfamilies. Under State Laws at present, step-parents may adopt the child of their new partner. Motives may be excellent and outcomes may be satisfactory, but adoption means the child's name is changed, family relationships are severed and the child completely loses his or her old identity. Access to the child's original birth certificate is denied and the child may never be able to trace the identity of the other natural parent. Relationships with some members of the child's natural family are distorted and may be effectively destroyed.

Patricia Harper argues here that this is unwarranted. Current thinking in the area of adoption legislation and practice is moving towards greater openness, in particular, towards providing access to birth records once adoptees come of age so they can trace their origins and piece together the jigsaw pieces of identity. How anomalous then, that adoption law should deny the large numbers of stepchildren adoptees the right of access to such information when they still live with one of the natural parents and may still see the other natural parent.

The proposed alternative is that step-parents be enabled to seek guardianship or custody rights, but that adoption of stepchildren be abolished. Changes recommended by the Report of the Watson Committee to the Family Law Council regarding definitions of custody and guardianship are seen as desirable, as is the amendment of existing State acts to mirror the 1983 amendments to the *Family Law Act*.

Patricia Harper has consulted widely in the preparation of this paper. As Director, I presented the first draft recommendations to a meeting in Alice Springs in October 1982 of the Conference of Welfare Administrators, that is, the directors of every State and Territory department with welfare responsibilities. Their reception was positive because they had grappled with the issue many times and the paper crystallised the arguments and issues. We are grateful to them and to their departments for further comments on the draft and for providing up-to-date details of State adoption legislation and adoption statistics. It is essentially their burden to convince State legislators that further changes to adoption legislation are essential if the rights of stepchildren are to be preserved, while enabling step-parents who seek to clarify their rights and obligations to do so by means of custody or guardianship orders.

The author of this paper, Patricia Harper, is a Research Fellow with the Institute of Family Studies. She has worked in many community organisations, such as the National Council for the Single Mother and her Child, and on government advisory bodies including the Family Law Council, the Victorian Adoption Legislation Review Committee and the Victorian Child Welfare Practice and Legislation Review Committee. She is currently Convenor of the Victorian Women's Advisory Council.

Don Edgar
Director
Institute of Family Studies

Synopsis

One of the features of Australian society during the past 25 years, from the late 1950s to the early 1980s, has been the changing nature of the family. There have been significant changes in family formation and breakdown; in family composition and structures; in family relationships; and in the status, rights and obligations of family members. This paper will:

- outline some of these changes, with particular focus on the implications for families where one or both of the parents have children from a previous marriage or relationship, that is stepfamilies;
- examine the arrangements which have been made by some families to clarify and establish the legal status and family relationships of children and step-parents, especially by the use of adoption orders, and the implications and appropriateness of these arrangements;
- examine the legal options available in establishing legal status and family relationships in stepfamilies, and the appropriateness of these options;
- recommend changes to legislation to overcome existing problems and to provide a more appropriate means of establishing the legal status and clarifying the family relationships of stepchildren, step-parents and family members.

The term 'stepfamilies' is used throughout this paper in preference to 'blended families' or 'reconstituted families' because it is the term most generally used and understood in the community, and because it can be used more flexibly, for example, step-parents, stepchildren. In fact, the word 'step' derives from Old German and Old English terms which related to experiences of bereavement and deprivation. The Old English term, *stoep*, meant related by deprivation of a blood relationship, an orphan. Although these earliest descriptions referred specifically to the child, the term was later broadened to refer also to the replacement parent (Wald, 1981, p. 46).

1 Definitions

The following definitions, used in this paper, are those recommended in the Report of the Watson Committee, November 1982. This committee of the Family Law Council, chaired by Justice Watson of the Family Court of Australia, was required to examine, among other things, the terms 'guardianship', 'custody' and 'access', their meaning and use in practice, and to recommend whether and how such terms should be defined in the *Family Law Act*.

Guardianship The custody of a child and the responsibility for the long-term welfare of the child, including decisions concerning education, changes in place of residence, religion, employment and any health needs other than of an urgent or routine nature, as well as all rights, powers and duties hitherto vested by law or custom in the guardian of the child.

Custody The responsibility for the daily care and control of the child, including decisions concerning accommodation, attendance at school, clothing, feeding, transportation, behaviour and urgent or routine health needs of the child.

Access The contact of a child with a person other than the person having custody, whether by way of a visit by or to that person, including attendance for a period of time at a place other than the child's habitual residence, or by way of communication by letter, telephone or other means with that person.

The above definitions of guardianship, custody and access have been incorporated into the Northern Territory *Community Welfare Act* 1983, and were adopted for use in the Report of the Adoption Legislation Review Committee, Victoria, March 1983.

The *Family Law Amendment Act* 1983 slightly amended the Watson Committee definitions (the concept of custody was separated out from that of guardianship) and omitted the definition of access. This Act provided for the following definitions to be included in S.60 A (1) and (2) of the *Family Law Act*:

- Guardianship
  A person who is the guardian of a child under this Act has responsibility for the long-term welfare of the child and has, in relation to that child, all the powers, rights

and duties that are, apart from this Act, vested by law or custom in the guardian of a child, other than —

(a) the right to have the daily care and control of the child; and

(b) the right and responsibility to make decisions concerning the daily care and control of the child.

- Custody

A person who has or is granted custody of a child under this Act has —

(a) the right to have the daily care and control of the child; and

(b) the right and responsibility to make decisions concerning the daily care and control of the child.

These provisions of the *Family Law Amendment Act* came into operation on 25 November 1983.

2 Changing family patterns

Changes affecting the nature and structures of families in Australia have been reflected in the statistics over the past decade and more. According to the Australian Bureau of Statistics (ABS *Marriages Australia*), in the late 1960s marriages averaged 106 188 per annum; by 1982 the number had risen only slightly to 117 275. Divorces over the same period more than trebled from an average of 10 681 per annum in the late 1960s to 44 088 in 1982, with the rate rising from 10 per 10 000 population in 1971 to 29 per 10 000 in 1982 (ABS *Divorces Australia*).

The median duration of marriages ending in divorce has fallen from 13.9 to 10.4 years, and one in five marriages (20.3 per cent) now end in the first five years of marriage, compared with one in thirteen (7.9 per cent) in the late 1960s (ABS *Divorces Australia*).

The number of marriages involving a previously married partner or partners has more than trebled, from one in ten of all marriages (10.3 per cent) in 1970 to one in three (32.1 per cent) in 1982. This continued increase in remarriages, both in numbers and as a proportion of all marriages, has resulted from a rise in the number of divorced persons remarrying. In 1982, nearly one in four of all men and women marrying had been previously married (men 23.4 per cent and women 23.6 per cent), compared with just under one in ten for the years 1966-70 (men 9.1 per cent and women 9.3 per cent) (ABS *Marriages Australia*). Just over half the divorced persons marrying in 1982 married partners who were also divorced.

In 1982, 53 010 dependent children were involved in divorces, an average of two children per divorced couple with children, and an average which has remained constant over recent years. From 1975-82, 413 706 children have been involved in divorces (ABS *Divorces Australia*).

No figures are available concerning the number of children in families where one or both of the partners have children from a previous marriage or relationship, that is, stepchildren.

However, it is possible to estimate the approximate number of children who are likely to move into a stepfamily in one year. From the 1982 Australian Bureau of Statistics' figures, which indicate that there were 22 860 marriages of widowed and divorced women aged less than 50 years, and

Table 1 Number of children in divorces and percentage distribution, 1975-82

Year	*Number of children*	*Average number of children in divorces*
1975	34 992	2.1
1976	73 645	1.9
1977	57 878	2.0
1978	51 599	2.0
1979	46 130	2.0
1980	46 836	2.0
1981	49 616	2.0
1982	53 010	2.0
Total	413 706	

Source: Australian Bureau of Statistics, *Divorces Australia*, 1980, 1982, Catalogue no. 3307.0

assuming an average of 1.3 children for each of these women (1.3 being the average number of children for all women divorcing under 20 years of marriage), it is possible to calculate that approximately 30 000 children may have entered stepfamilies in 1982. Such estimates do not, however, include an additional group of stepchildren resulting from bringing into a marriage children of a previous non-marital relationship. (There is no way of estimating the size of this group, although we know that the number of ex-nuptial births in 1982 was 32 958.) We can therefore assume that the number of children becoming stepchildren in 1982 was in the region of 30-35 000.
To summarise, the above statistics tell us that:

- marriage breakdown rose significantly during the 1970s and remains high;
- the average duration of marriages ending in divorce continues to decline;
- an increasing proportion of marriages each year involves a previously married partner or partners (one in three in 1982) many of whom bring children into the new marriage;
- a significant number of children have been involved in divorces — nearly half a million since 1975;
- an increasing number of children are entering, or living in, stepfamilies following the breakdown of their parents' previous marriage or relationship;
- some marriages involving stepchildren are breaking down and ending in divorce.

Given that the pressures leading to marriage breakdown appear likely to be greater in stepfamilies, where such tasks as establishing new parent-child and sibling relationships place additional stress on the marital relationship, marriages involving stepchildren thus appear likely to be of shorter than average duration.

As well as these changes to families over the past decade or more, particularly the increase in the number of children living in stepfamilies, there has been another factor of significance: the increasing proportion of adoptions of children by a natural parent or spouse, that is, step-parent adoptions. This is best seen by looking at the changing adoption figures since the late 1960s.

3 Trends in adoption

The number of adoptions in Australia over the last ten years has fallen dramatically, the total for 1982 (2971) being less than one-third of adoption for 1972 (9798) — while the fall in non-relative or 'baby' adoptions has been even more significant. At the same time, the proportion of step-parent adoptions has increased significantly. Unfortunately, Australia-wide statistics are not available for the period prior to 1980, hence the trend over the past 12 years in the proportion of children being adopted by step-parents, as against non-relative or 'baby' adoptions, can only be illustrated by using State (i.e., New South Wales) as against Australian statistics for 1969-70 as a base-line.

It should be noted that no further breakdown of statistics is available on an Australia-wide basis as to the categories of step-parent adoption (e.g., adoptions into second marriage, adoptions by spouse of previously single mother). But figures available from those States and Territories which do categorise these adoptions indicate that, for the years 1980-81 and 1981-82, step-parent adoptions were fairly evenly divided between adoptions into a

Table 2 Trends in step-parent adoptions

	Step-parent adoptions	*Relative adoptions*	*Non-relative adoptions*	*Total adoptions*	*Step-parent adoptions as % total adoptions*
1969-70 (NSW only)	282	38	2026	2346	12.02
1971-72 (NSW only)	702	109	3728	4539	15.46
1981-82 (Australia)	1422	72	1477	2971	47.86

Source: Australian Bureau of Statistics, *Statistics of Adoptions NSW*, 1969-70, 1971-72, Catalogue no. 4401.1
Australian Bureau of Statistics, *Adoptions Australia*, 1981-82, Catalogue no. 4406.0

second marriage (291 in 1980-81 and 282 in 1981-82) and adoptions of ex-nuptial children (224 in 1980-81 and 269 in 1981-82).*

From these statistics it is clear that some families are using adoption as a means of establishing the legal status and family relationships of stepchildren and step-parents within the new family. It is also clear that only a small percentage of stepfamilies choose to use adoption for this purpose or see adoption as an appropriate mechanism for clarifying and establishing family relationships. In 1982, an estimated 30-35 000 children could potentially have become part of a stepfamily: only 1422 children were the subject of step-parent adoptions in that year.

Because adoption is still seen by some families as a means of incorporating children into the parent's new marriage, it is important to examine such adoptions, the reasons they occur, their legal effects, the appropriateness of such arrangements and whether they are in the best interests of the children involved.

* These figures are based on step-parent adoptions statistics for 1980-81 and 1981-82 in Victoria, Western Australia, Tasmania and the Northern Territory which were made available to the author during the preparation of this paper.

4 Adoption by step-parents

The Acts relating to the adoption of children of each of the States and Territories provide for the adoption of a child into a stepfamily. This can be done in all States and Territories by the natural parent of the child and his or her spouse *jointly* adopting the child — or, in Queensland and Western Australia, by the spouse *alone* adopting the child.* Step-parent adoptions occur in several different situations:

- Where a previously married partner and spouse adopt the child of the previous marriage into the second marriage. Such adoptions require the consent of the other parent of the child.
- Where a spouse and his wife, who was previously a single mother, adopt her child into the marriage. Except in South Australia, such adoptions do *not* require the consent of the child's father because the child is ex-nuptial. In South Australia, provided that paternity is established in accordance with the *Family Relationship Act* 1975, the father's consent is required.
- Where a widow/widower remarries and, with the new spouse, adopts her/his child into the marriage. These adoptions do not require the consent of any other person unless a joint guardian was appointed on or prior to the death of the former parent.
- Where a parent previously living in a de facto relationship marries and the child is adopted into the marriage. Where it is the child's father who marries, the consent of the mother *is* required. Where it is the child's mother who marries, the consent of the father is *not* required (unless the adoption takes place in South Australia) because the child is ex-nuptial.

Adoption legislation requires the written consent of the child's parent/s before the child can be placed for adoption. Where a parent refuses to sign a consent, the adoption cannot proceed unless an application is made to the court to dispense with that parent's consent.

* Although S.11(4) of the *Adoption of Children Act* of South Australia permits a step-parent to adopt alone, in practice only joint applications are accepted.

Reasons for adoption

There appear to be a number of reasons why adoption orders are sought in such situations. In any particular adoption, one or more of the following reasons may apply.

Change of surname This occurs where the mother remarries, and the parents seek to give the child the same surname as the mother now has (i.e., that of the step-father).

Change of birth certificate Adoption provides for a new birth certificate to be made out registering the child as the child of the adoptive parent/s (i.e., his or her parent and step-parent). This new birth certificate gives the child a new surname where the adoption is by a stepfather.

Inheritance rights Adoption provides for the child to gain automatic inheritance rights from the step-parent and his or her extended family.

Maintenance rights Adoption gives the child the right to maintenance against the step-parent, and the natural parent may consent to adoption to avoid the obligation to pay maintenance. This is especially likely where pressure is being exerted to minimise or end access between the natural parent and the child.

Parental rights and obligations Adoption confers full legal parental rights and obligations on the step-parent, and in particular provides that the step-parent becomes the legal guardian of the child and has the right of custody of the child. Such rights are seen as important by many in the event of the death of the natural parent, so that the step-parent can act after the death as a legal parent of the child.

'Normality' and stability of the new marriage Adoption provides that the spouse shall be deemed to be a parent of the child jointly with the parent 'as if the child had been born (to them) in lawful wedlock'.* Some stepfamilies feel that adoption makes them just like other 'normal' families and that it will add to the stability of the new marriage.

Demonstration of commitment Some step-parents want to indicate their commitment to the long-term well-being and security of the child, and feel that they are doing this by adopting the child.

Strengthening family relationships By establishing a full legal parent-child relationship by means of adoption, it is felt that the child will grow closer to the step-parent thus strengthening family relationships within the new marriage. Such a rationale might also see adoption as strengthening family relationships in the new family by virtue of the fact that adoption severs all legal ties with the other parent and thus may weaken those ties with the former family which are seen as a threat to the step-parent or to the new stepfamily.

Discourage continuing relationships with, and access to, the other parent and extended family Coupled with the step-parent's desire to have extra standing as a result of adoption, there is often the feeling that if adoption is granted, the other natural parent will cease to maintain the child (that obligation being

* From the South Australian *Adoption of Children Act* 1966, S. 30 (1) (a).

transferred to the step-parent), that visits will become fewer or cease, and that as children grow more remote from their natural parent, they will grow close to the step-parent. This is often associated with an element of competition between the natural parent and the step-parent. In some cases, adoption orders are sought in order to cut off the access rights of the other parent.

Concept of children as possessions It is still not uncommon for children to be seen as possessions or property to be transferred from one owner or parent to another. Such parents see themselves as having absolute rights to make all decisions regarding the welfare and future of the child, even decisions which involve severing important family ties.

Disguise history Adoption enables family members to pretend that previous family relationships no longer exist or are of no importance, and that the child is now the child of the step-parent as though born to him or her.

Permanency Adoption is not reversible except in exceptional circumstances.

Lack of knowledge of other options or the unsatisfactory nature of these alternatives.

It is important to note that many of the reasons lying behind step-parent adoptions relate to psychological needs or issues, and involve a failure by society and the law to come to terms with step-parenthood. This point is well made by Brenda Maddox in her instructive and sensitive book, *The half-parent*, where she points out that 'the step-parent has not been described in a flattering way in literature from *Hansel and Gretel* through *Cinderella* to *Snow White and the seven dwarfs*. Such myths do not make it easy for step-parents to find a satisfactory role, and the law has been slow to define the rights and duties of the step-parent' (Bissett-Johnson, 1980, p. 389).

Effects of adoption

The legal effect of an adoption order in favour of a parent and step-parent was clearly and concisely described by the UK Houghton Committee in their Report (1972) in the chapter 'Relatives — adoption or guardianship?'

> Adoption by relatives severs in law, but not in fact, an existing relationship of blood or of affinity, and creates an adoptive relationship in place of the natural relationship which in fact, though not in law, continues unchanged (p. 27).

In addition, adoption provides that the step-parent is deemed to be the parent of the child as if 'the child had been born in lawful wedlock.'

In those Australian States which require a joint adoption by both the parent and step-parent, the effect of the adoption is to distort reality and relationships which exist in fact. Thus one natural parent relinquishes all legal rights as the parent of the child, these rights then becoming vested equally in the parent and step-parent as the adoptive parents. The other natural parent's legal relationship to the child changes — from a natural to an adoptive relationship. Relationships between the child and members of their extended families, both natural and adoptive, follow the same pattern of change.

The effects of an adoptive order are more bluntly described by Richard Chisholm (1982) in a paper delivered at the Third Australian Conference on Adoption, 'Changing Families':

> . . . adoption operates . . . to *transfer* the whole bundle of rights and responsibilities away from the birth parents and to the adoptive parents. Adoption is a package deal; the king-hit of family law. At one stroke all legal links with the actual parents and relatives are severed and a new set of 'pretend' family members are created (p. 85).

For the child, an adoption order in favour of a step-parent means:

- all legal ties with his or her natural parent are permanently severed and the law states that they are no longer parent and child;
- the legal right of access to, or contact with, the natural parent (and other members of the family such as a grandparent) is lost;
- the loss of the child's right to information about his or her natural parent/family, including the loss of the right of access to a copy of his or her original birth certificate;
- the loss of the name given at birth, in many circumstances;
- the loss of the automatic right of inheritance from his or her natural parent and family;
- another person becomes his or her new parent with all the rights which that involves.

The legal effects of an order permitting a step-parent adoption are therefore clear, final and unequivocal.

The social and psychological implications of step-parent adoption are not so clear, final nor unequivocal, relating as they do to the nature of the social, psychological and emotional bonds which exist or develop between the various members of the step-family, the natural family and the new extended family. In particular, for the child and the other natural parent (now no longer a parent) and extended family, there are potentially negative social and emotional implications, including the weakening or loss of previous family contact and ties.

Given the far-reaching and permanent nature of an adoption order, it is obviously important to examine the appropriateness of adoption by step-parents as a means of clarifying and establishing family relationships and legal status. If the community, through legislation, is to provide the means of reviewing and reallocating parental rights and responsibilities (whether by adoption or some other arrangements) when family circumstances change, then it is essential that an attempt be made to set out the objectives of such legislation.

Objectives of legal arrangements affecting family members

Two significant areas of need in stepfamilies should be considered in seeking to define these objectives:

- the social, psychological and emotional relationships and needs of the children and other family members;
- the legal status and relationships of family members, including parental rights and obligations.

As indicated earlier, the reasons of step-parents for changing the legal status and relationships of the child are many and varied and may not include facilitating the social, psychological and emotional ties of the child and his or her family.

The major objectives of legal arrangments (whether adoptions or other) affecting status, rights and obligations might be held to be:

- to facilitate and strengthen the social and psychological relationships between the child and both natural parents and their extended families;
- to enable the development of a close nurturing relationship between the child and step-parent who will be providing for the child's day-to-day care, and members of the step-parent's family;
- to facilitate positive relationships between significant members (to the child) of both the child's natural and stepfamilies;
- to clarify and establish in law the rights and obligations of the *step-parent* who has indicated a willingness to assume a long-term parental commitment to the care and welfare of the child of the spouse;
- to clarify and establish in law the ongoing parental rights and responsibilities of the *natural parent* who no longer has custody of the child but who will generally remain a guardian of the child with consequent rights and responsibilities, including the right of access to the child.

If step-parent adoptions are examined in the light of the above objectives, it is possible to assess the appropriateness of such adoptions.

Appropriateness of adoption

Adoption does not appear to meet the first objective of facilitating the child's relationships with both natural and stepfamilies, for adoption seeks to create by law one set of social and family relationships at the expense of another set of social and family relationships. Severing a child's links with one half of his or her own family will clearly not facilitate the child's relationship with that natural parent and members of the extended family, and could be damaging to the child. It is by no means clear, either, that severing these links will benefit the child's relationship with the custodial parent, let alone with the step-parent. The child may well resent losing these ties with one half of his or her family (and thus of him or herself) and the changing or closing off of records that this entails. This is especially apparent in the light of adoption research which in recent years has demonstrated overwhelmingly the importance to a child of knowledge of his or her origins.

Facilitating relationships between the child and family members following the creation of a stepfamily, relates to the tenuous and complex nature of the social, psychological and emotional ties which exist between a number of individuals and family members, for example:

- between the child and the custodial parent who has married/remarried, and established a new relationship with another adult, the nature of which will affect the existing parent-child relationship;
- between the child and the other natural parent and extended family, with whom the child may now have less (or no) contact — yet where the maintenance of ties and an ongoing relationship are of great importance to the child and his or her sense of identity;
- between the natural parents of the child, and the ability of the parents to resolve the differences and conflict between them, which resulted in the breakdown of their relationship, so that these are not carried over into their relationships with the child;

- between the child and the step-parent, which are often difficult relationships because the step-parent may be replacing a parent with whom the child retains strong social, psychological and emotional ties, and because the step-parent may be seen by the child to be usurping the role and rights of the absent natural parent;
- between the custodial parent and step-parent, in terms not only of their new marital relationship, but in terms of the new or differing relationship each of them has in their parenting roles with respect to the children — especially in establishing a balance of rights and responsibilities in areas such as attention-giving and discipline;
- between the step-parent and the non-custodial natural parent of the child, the nature of this relationship possibly playing a significant role in determining the success and stability of the new family arrangements;
- between the children of two different families where both adults bring children into the new marriage — the sorting out by the children of their new relationships will not be an easy one, and will be significantly affected by the attitudes and expectations of the various parental figures.

For the members of the stepfamily, therefore, the reality of the complex and tenuous nature of the social, psychological and emotional relationships which exist or develop between various members of the natural and the stepfamily and extended families is not reflected in the finality and unequivocal nature of the legal arrangements constituting adoption which results in the severance of the child's ties with one half of his or her family.

Adoption may at first appear to come closer to meeting the second objective, that of clarifying and establishing the legal status and parental rights and obligations of both the step-parent and the other natural parent. Yet using adoption to achieve this involves completely extinguishing all legal links between the child and the other natural parent.

It is questioned whether such a complete and final severance of ties is in the best interests of the child. *In most, if not all cases the step-parent is already caring for the child and will continue to do so whether or not the child is adopted.* Thus, a complete severance of the ties between the child and the natural parent and family by means of adoption seems neither necessary nor appropriate in order to ensure that the step-parent continues to care for the child and would not appear to be in the best interests of the child.

In addition to the above considerations, further problems can arise when step-parent adoptions are sought.

- Siblings who have been separated in custody settlements can lose all legal ties with each other when one or more are adopted into a new stepfamily.
- Adoption may put the child in the impossible situation of having to choose between two sets of adults and family relationships, both of which may be important to the child.
- Adoption can be used as a device to exclude a parent who has, and is exercising, access rights provided for under Federal legislation (*Family Law Act* 1975), frequently in accordance with a Family Court access order. Adoption workers indicate that such reasons are not infrequently cited as the reason why an adoption order is sought. Is it appropriate that State adoption legislation should be used as a means of circumventing the provisions of Federal family law legislation?

- Bargaining can occur in order to secure the natural parent's consent. For example, maintenance obligations, and/or property entitlements may be 'traded-off' to ensure the consent of the non-custodial parent to adoption.
- The question arises of assessing the suitability of the prospective adoptive parents, that is, the natural parent and step-parent. The community, through adoption legislation, regards such assessment for *non-relative* or 'baby' adoptions as essential to the welfare and interests of the child. Should such assessment be required, and undertaken for step-parent adoptions? Is such assessment needed to safeguard the child's welfare and interests? What should be the role of adoption agencies in such adoptions? Currently the practice of adoption agencies in the various States and Territories varies significantly, from careful and thorough assessment to 'rubber-stamping' of step-parent applications.
- What rights should the child have to be consulted, and at what age? How final should the child's wishes be? How should his or her wishes be determined and, by whom?
- Should there be a requirement as to the minimum 'waiting period' following the new marriage (in order to test the stability of the marriage) before an application to adopt can be made — one, two, five years? Should this be affected by the age of the child? Or by the nature and quality of the relationship of the child with various family members?
- The conflict or 'vacuum' which may result when the other natural parent refuses consent and a dispensation application fails.
- What should be the role of the State courts in dealing with such applications, especially given that many will deal with rights and responsibilities established under Federal legislation and possibly the subject of Family Court orders? And what of the attitude of the courts to dispensing with parental consent? In one State, an agency social worker commented that there appears to be a marked difference in the attitude of the court where dispensation of parental consent is being sought so a step-parent may adopt a child, as against dispensation of parental consent to enable a child to be freed for adoption by non-relatives. In the former category dispensation of parental consent may be granted after a minimal search for the natural parent, whereas an exhaustive search for natural parent(s) and documental evidence is required for children in the latter category. The views of the legal parent are unlikely to be extensively canvassed in the event of a step-parent adoption, and only if the wider family members take steps to become parties to the adoption proceedings is there any certainty of their views being considered in relation to the well-being of the child. This contrasts markedly with the extensive evidence and detailed working with the natural family over many months, and even years, which is required by the court where adoption of a child by non-relatives is seen as in the child's best interest.

The attitude of the courts

There are few recorded judgements of Australian courts dealing with the issue of step-parent adoptions. The prevalence of these adoptions, however, aroused disquiet in the English courts prior to the enactment of the *Children Act* 1975, particularly where an application to adopt followed a parent's

remarriage. In England, *In Re D (Minors) (Adoption by Parent)**, the President of the Family Division denounced such an application saying:

> All too often this is the course taken by the mother to disguise from her new neighbours on remarriage that she has been involved in a failed marriage; it cannot by itself be a legitimate ground for adoption, or generally in the interest of the children.

The President of the Family Division further referred to the Houghton Committee's view that:

> . . . the legal extinguishment by adoption of the child's link with one half of its own family was inappropriate and could be damaging, and that, while the law should not prohibit adoption by step-parents, guardianship would be more appropriate in most cases.

Other elements of this approach were articulated by two other members of the Family Division in a case, *In Re B (Adoption by Parent)*†. Bagnall, J. said:

> The disadvantages of adoption are perhaps too obvious to be stated. It is an irrevocable step constituting a change of status and also involving not only cutting the child off from his father as a matter of law, but also from grandparents and any other relevant members of the father's family. The child is thereby deprived of any opportunity, as he grows up in later life, to decide whether he wishes to maintain a contact with his father . . .
>
> There is a body of opinion that where there is a divorce followed by a remarriage and a very young child, the best course for the child is to make a complete break and allow the child to be brought up exclusively by a parent and a step-parent. That this view has not found favour in these courts is clear from recent decisions of the Court of Appeal to which I need not refer. Nevertheless it may well be that, where all parties are in agreement and the relevant parent consents, it can be established that adoption by a parent and the step-parent is for the welfare of the child. In such a case the other parent agrees, so to say, to disappear wholly from the child's life and to accept a change of the child's legal status. Even there I think that parents should hesitate long and think carefully before taking such an irrevocable step. Cases such as this, where the relevant parent refuses to consent to adoption, are quite different. The advantages which adoption may bring to the child can almost always be secured without a change in legal status. Where the application is made by a parent and a step-parent, after divorce and remarriage, I am of the opinion that only in very rare and wholly exceptional cases will it be possible to say that adoption against the wishes of a present and expostulating parent is for the welfare of the child.

Cumming-Bruce, J. said:

> I appreciate that in this case, as in many, it is strongly in the child's interest that he should be settled in the family life of the mother and her second husband; that he should form a close relationship with the father figure represented by that husband. I also appreciate that in this case, as in many, the fact that the child continues to have a relationship with his natural father is a source of practical inconvenience and irritation to the mother, who wishes to put her first husband out of her life as completely as possible. And, of course, the second husband may be expected to wish to keep the first husband completely out of their family life. Also, it is common experience that the emotional effect upon the child of an attempt to maintain dual

* In Re D (Minors) (Adoption by Parent) [1973] Fam. 209, 216, 585-586.

† In Re B (Adoption by Parent) [1975] 2 W.L.R. 585-586, 569, 583.

> and frequently conflicting loyalties to both parents, and to the step-father, is deeply disturbing sometimes gravely destructive to the stable development of his personality. But the appropriate court to regulate and control these difficult problems is usually the court seised of the family problems of the first marriage . . . It is quite wrong to use the adoption law to extinguish the relationship between the protesting father and the child, unless there is some really serious factor which justifies the use of the statutory guillotine. The courts should not encourage the idea that after divorce the children of the family can be shuffled and dealt out like a pack of cards in a second rubber of bridge. Often a parent who has remarried and has custody of the children from the first family is eager to achieve just that result, but such parents, often faced with very grave practical problems, are frequently blind to the real long-term interests of their children.

The above English judgements emphasise several of the key issues relating to step-parent adoptions which this paper seeks to address:

- the inappropriateness of adoption in step-parent situations as not being 'in the best interests of the child';
- the fact that 'the advantages which adoption may bring to the child can almost always be secured without a change in legal status', guardianship and/or custody being more appropriate in most cases;
- the importance of the courts and the community not encouraging the idea that 'children of the family can be shuffled and dealt out like a pack of cards in a second rubber of bridge';
- the question of the appropriate court to decide such questions — 'the appropriate court to regulate and control these difficult problems is usually the court seised of the family problems of the first marriage'.

These questions as to the appropriateness of step-parent adoptions arise regardless of whether such adoptions concern children from a previous marital or non-marital relationship. In this regard, the conclusions of J.M. Eekelaar in reviewing reported decisions of the English courts are particularly pertinent:

> It appears that a father's efforts to maintain contact with his legitimate children count towards a discharge of his 'obligations'; but those of a putative father are selfish and pleasure seeking. It is said to be in the interests of a legitimate child that he retains links with one half of the family (his father): but the intervention of the putative father is disruptive. It is not regarded in the children's interests if their mother attempts to conceal an earlier failed marriage; yet is is in their interests if she disguises (perhaps even from them) their origin in a failed loved affair. In particular, 'legitimacy' and 'respectability' are treated as paramount goals which override the value to the child of an existing love relationship with its father. The certainty of this relationship is not balanced against the uncertainties of the mother's new family unit. The result is that a double standard is applied, unconsciously, in the application of the welfare test as between legitimate and illegitimate children (Eekelaar, as quoted by Hambly, 1976, p. 91).

In agreeing with these conclusions, the Houghton Committee in England recommended that the law should not distinguish between nuptial and ex-nuptial children in this context, and proposed that a form of guardianship, rather than adoption, was more appropriate in all step-parent situations.

Changing attitudes to step-parent adoptions

Increasing concern has also been expressed in recent years, in both adoption circles and in the wider community, at the continuing use of adoption by step-parents. Many groups and individuals in the community now argue that the law of adoption, which was enacted primarily to deal with the placement of newly-born children relinquished soon after birth by a single mother to unrelated adoptive parents, is not appropriate as a means of establishing a relationship between children and step-parents. Rather, the answer is seen as lying with the use of guardianship or custody orders.

Such views have been advanced not only by people working in the field of adoption, including social workers and lawyers, but by members of the broader community. Participants at each of the three Australian Conferences on Adoption have supported such moves. At the First Australian Conference in 1976, the Task Group on Legislation and Legal Procedures recommended:

> That the Adoption of Children Acts should be amended to provide that in an adoption application by relatives or by a parent and step-parent, the Court should not make an adoption order unless it is satisfied that an adoption order would better promote the interests of the child than a custody or other order (pp. 169-170).

This call for change was echoed by the third conference in 1982, which urged:

> That a wide range of legal alternatives be explored and devised to increase the range of care options while acknowledging the child's continuing and existing relationships (in particular, step-parent adoptions should be discontinued) (p. 396).

Expert committees established to review adoption legislation in both England and Australia have reached similar conclusions.

In England, the report of the Departmental Committee on the Adoption of Children (the Houghton Committee) gave detailed examination to this issue and concluded that guardianship would be 'more appropriate' than adoption for most children.

> 97. . . . the number of adoptions by parents and step-parents has increased and there is reason to think that this is a continuing trend. This latter category differs fundamentally from adoptions by non-relatives, which create relationships where previously there were none. Adoption by relatives severs in law, but not in fact, an existing relationship of blood or of affinity, and creates an adoptive relationship in place of the natural relationship which in fact, though not in law, continues unchanged. In most cases the adopting relatives are already caring for the child and will continue to do so whether or not they adopt him; and adoption by relatives can be particularly harmful when it is used to conceal the natural relationship.
>
> 104. Where the mother of an illegitimate child has married a man who is not the child's father, and the couple apply jointly to adopt the child, the effect of the adoption is that the mother relinquishes her sole legal rights in relation to the child, which becomes vested equally in her and her husband. Her own legal relationship to her child changes from the natural to the adoptive relationship. The motives behind such applications are generally simple — to change the child's name and birth certificate and to confer full legal rights and obligations on the stepfather who wants to assume responsibility for the child.
>
> 105. Adoption of legitimate children on the remarriage of a parent are increasing and the circumstances in these cases may be varied. We suggested in our working

paper that it was desirable to recognise openly the fact and the consequences of divorce and of death; that one of these consequences is that many children are living with a parent and a step-parent; and that the legal extinguishment by adoption of a legitimate child's link with one half of his own family was inappropriate and could be damaging.

An alternative to adoption.

106. At present adoption is the only way in which a step-parent may assume all the rights and obligations of a parent. We recommend, in Chapter 6, the extension of guardianship law to enable him to be appointed guardian of the child. The mother's legal relationship with the child would continue unchanged. If it were also desired to change the child's name, this could be done in England and Wales by simple deed or deed poll. If the stepfather wished the child to inherit from him, he could make a will. It thus seems that the aims referred to in paragraph 104, with the exception of a new birth certificate, could be achieved without the need for adoption at all, so avoiding the artificiality involved in adoption by a natural parent.

As a result of its deliberations, the Houghton Committee proposed that:

The law should provide a means, short of adoption, whereby relatives . . . already caring for a child may obtain legal recognition of their relationship with the child. Accordingly *we recommend* that: The right to apply for custody under the Guardianship of Minors Act 1971 (which we call, for convenience, 'guardianship') should be extended for this purpose to relatives already caring for a child . . .

In the light of (the above) recommendations . . . (that relatives caring for a child should be able to apply for guardianship), where a relative (including a step-parent applying jointly with his spouse) applies to adopt a child, the law should require the court first to consider whether guardianship would be more appropriate in all the circumstances of the case, first consideration being given to the long-term welfare of the child (pp. 27-38).

In Australia, the Victorian Adoption Legislation Review Committee (ALRC), established in 1978 by the Attorney-General and the Minister for Community Welfare Services, also examined closely the issues involved in adoption by step-parents, and consulted widely with a broad range of individuals, agencies and organisations. In its report to the Ministers in March 1983, ALRC reached conclusions similar to those of the Houghton Committee:

We are concerned about the effect on some children — particularly those who have an established relationship with the other parent and/or his/her relatives before the marriage was dissolved or the death of a parent — of the legal extinction by adoption of the child's link with one half of his/her natural family. Sometimes, adoption plans put the child in the stressful situation of having to choose between two sets of adults and family relationships, both of which may be important to the child.

We consider that the absurd fictional transformation of the natural parent into an adoptive parent, which currently occurs in the case of a natural parent and step-parent adoption, is undesirable in view of the distorted relationships which result. The Committee notes that in Western Australia and South Australia the law has been altered to allow for adoption by step-parent without requiring the natural parent to adopt the child (Western Australian *Adoption of Children Amendment Act* 1976, Section 8; South Australian *Adoption of Children Act* 1966-67, Section 11(4)). The Committee notes as well that the Queensland *Adoption of Children Act Amendment Bill* 1982 also provides for the making of an adoption order in favour of a spouse of the natural parent or adoptive parent of the child concerned. However,

this does not alter the Committee's basic objection to natural parent and step-parent adoption as a widespread practice.

We consider too, that adoption by a natural parent and step-parent, regardless of the conditions specified in the adoption order, would still tend to disturb the natural relationships within a family, especially if the child is in regular contact with the natural parents, and/or relatives. The Committee is aware of the distress of relatives whose legal relationship to the child is extinguished by the step-parent adoption. We believe that such extinguishment is usually unnecessary and not in the best interests of the child (ALRC, 1983, p. 54).

The Adoption Legislation Review Committee concluded by recommending:

That the court grant an order for guardianship and/or custody to a step-parent seeking to establish a legal relationship with a stepchild.

That the court grant an adoption order in favour of a step-parent only where the court is convinced that an order for guardianship and/or custody should not be granted, and that special circumstances exist which require the court to consider the granting of an adoption order.

That, where adoption is considered by the court to be appropriate, the adoption order be granted to the step-parent only and access to the original birth certificate be maintained as well as the issue of a new certificate (ALRC, 1983, Recommendations 29-31, p. 55).

An expert committee of the Family Law Council (an advisory body to the Federal Attorney-General), the Watson Committee, established in 1979, discussed the question of the nature of the legal arrangements between children and step-parents. This committee of judges, lawyers and welfare specialists, chaired by Justice Watson, a senior judge of the Family Court of Australia, discussed the needs of some stepfamilies to clarify and establish the parental rights and duties of step-parents with respect to their stepchildren. The Committee's terms of reference required it, among other things, to:

- Examine and define the meaning of the terms 'guardianship', 'custody' and 'access', initially for the purposes of the *Family Law Act*, eventually with the broader objective of establishing definitions which would be uniform throughout Australia with respect to Federal, State and Territory legislation. This was in line with the recommendations of the Federal parliamentary Joint Select Committee on the Family Law Act which recommended, that State and Federal legislation 'should be examined to ensure a consistent use of such terms, and the terms defined so as to precisely express the 'nature of the relationship between a child and the person standing in a relationship towards the child'.
- Examine the problems relating to the change of surname of a child of a marriage.

Like the English courts, the Watson Committee argued that the use of adoption orders was inappropriate — and recommended amendments to the *Family Law Act* which would enable the situation to be resolved by empowering the Family Court to make orders for guardianship and/or custody in favour of a step-parent.

Consistent also with the objective of clarifying rights and duties in relation to children of a marriage is the Committee's recommendation that an amendment to S.64(2) of the *Family Law Act* is required to make clear that courts exercising jurisdiction under the Act have the power to make orders placing children solely or

jointly in the guardianship or custody of a person other than a party to the marriage. By so providing, courts would have power in appropriate circumstances to place a child in the joint custody of a natural parent and a step-parent with the resulting effect of securing the legal relationship between the child and step-parent without severing the child's link with the other parent, as would be the consequence of the adoption of the child by a step-parent. Furthermore, as referred to earlier, the Committee proposes that where there is disagreement between joint guardians an application can be made to the court for its directions.

The problems which the Committee has sought to address in this context will arise in any event if the amendments proposed to the *Family Law Act* concerning the definition of child of a marriage, which are currently before the Parliament, are enacted. Under the proposed amendments (Clause 4, *Family Law Amendment Bill* 1981)* a child in the present situation, who becomes part of another household on the remarriage of the custodial parent, will be a child of that second marriage as well as a child of the dissolved marriage.

It is the view of the Committee that its proposals are consistent with the provisions of the Amendment Bill. Together they will provide a more flexible means of resolving issues affecting children of successive marriages than the solution currently provided by adoption, to which resort is frequently made (Watson Committee Report, 1982, p.13).

There is therefore widespread and increasing recognition in the community of the inappropriate nature of step-parent adoptions except in exceptional circumstances. Alternatives such as the use of guardianship or custody orders are recommended as reflecting more closely the best interests of the children and other family members involved. It is essential therefore to examine such legal alternatives and their appropriateness.

* The *Family Law Amendment Bill* 1983 contained the same provisions in respect of definitions of a 'child of a marriage' as the 1981 Bill. Its provisions took effect from November 25, 1983.

5 Legal alternatives to adoption

Legislative changes in England

Following the Report and Recommendations of the Houghton Committee regarding the inappropriateness of step-parent adoptions and the need to provide for guardianship orders, legislation was introduced to give effect to its proposals.

The *Children Act* 1975 incorporated these recommendations of the Houghton Committee by means of two separate provisions.

1 **An order for custodianship** S.33(1) provides that a court may make an order, to be known as a 'custodianship' order, vesting 'legal custody' in a step-parent.

A 'custodianship' order provides for *legal custody* of the child, which means 'so much of the parental rights and duties as relate to the person of the child (including the place and manner in which his time is spent)' but does not include effecting or arranging for his 'emigration' from the United Kingdom.

It is important to note that this part of the UK *Children Act* providing for custodianship orders has not yet been proclaimed — apparently because of the costs involved in operating these provisions.

However, a step-parent can not apply for custodianship if the child has been named in an order arising out of divorce proceedings in the UK *Matrimonial Causes Act* 1973 (relating to arrangements for the welfare of the child) unless the other parent is 'dead or cannot be found'. If the child has been named in an order in divorce proceedings, the step-parent may only apply for an order for 'custody'.

2 **An order for custody** S.10(3) provides that where an adoption application is made by a parent and step-parent, the court shall dismiss the application if it considers the matter would be better dealt with under S.42 (orders for custody, etc.) of the *Matrimonial Causes Act* 1973. A step-parent must use this provision, which provides for an application to the divorce court for a custody order, and *can not* apply for a custodianship order, if the child has been named in an order in divorce proceedings under the *Matrimonial Causes Act*, as outlined above. Such an order for custody in favour of the step-parent provides for *actual custody* of the child meaning 'actual

possession of' the child (which is narrower than 'legal custody' or 'custodianship'). While a person has actual custody of a child, he has the 'duties' of a person with 'legal custody', that is, a custodian. This section (S.10(3)) of the *Children Act* was one of the first parts to be implemented and took effect as from November 1976. Since then, judges hearing adoption applications have been required to dismiss them if the matter could be better dealt with by a custody order.

A report of a study by the British Agencies for Adoption and Fostering, titled 'Step-parent adoption — a summary' (1981), indicated a sharp reduction in the number of applications by step-parents to adopt, although the courts' varying interpretation of S.10(3) appears to significantly affect the final outcome as to whether a custody or adoption order will be granted. The terminology in the United Kingdom remains confusing, complex and ill-defined.

Developing a framework for change in Australia

At present in Australia, the only legal alternative to adoption by which the family relationships and legal status of children and stepfamilies can be clarified and established is the making of an order for guardianship or custody. Yet the use of orders for guardianship or custody in step-parent situations is uncommon, despite the advantages such orders appear to offer and despite the growing opposition to the use of adoption orders. Why, then, have orders for guardianship or custody been so rarely sought by step-parents?

The following section outlines some of the reasons why such orders have been relatively rarely used by step-parents.

1 The meaning of the terms 'guardianship' and 'custody' has been surrounded by complexity and confusion which has been accentuated by the lack of definitions common to Federal and the various States' legislation, and by the plethora of terms which are used interchangeably. Thus 'custody' is in some instances equated with 'care and control' or 'possession' of a child while in others it is equated with 'guardianship'. Given that the courts, lawyers and other legal experts have in the past been unable to agree on a standard definition for each of these terms and the rights and obligations they confer, it is not surprising that the ordinary citizen has had little recourse to their use or has seen them as providing a viable legal alternative to adoption.
2 There is a lack of knowledge in the community of the existence of guardianship or custody as a viable alternative to adoption. There is also a lack of understanding of the rights and obligations conferred by such a status, associated with a perception that the rights conferred are inadequate. This is further complicated by the difficulties outlined above as to what guardianship and custody actually mean. People generally fail to understand that a transfer of guardianship and custody to a step-parent involves all the parental rights and obligations vested in a natural parent, apart from inheritance rights and the issuing of a birth certificate in the name of the step-parent, and that these two questions of inheritance and surname can be dealt with by other means.

3 The 'high profile' of adoption and a general understanding of what adoption means leads many parents and spouses to see adoption as 'the obvious answer' to their needs; many may not be aware of, or adequately informed as to, the possibility of seeking an order for guardianship or custody.
4 Seeking guardianship or custody can be expensive and complex because it entails an application to the State Supreme Court to have the child made a ward of court so that an application for guardianship or custody can be considered. On the other hand, adoption can be cheaper and more straightforward, especially where there is no difficulty in obtaining the consent of the other natural parent.
5 Guardianship and custody do not provide the absolute powers and finality of adoption. By their nature, guardianship and custody are less absolute, may be qualified in certain respects and can be more easily changed or revoked.
6 Unlike adoption, guardianship and custody rights do not sever the access rights of the other natural parent, or members of the extended family.
7 Unlike adoption, guardianship and custody rights do not make automatic the changing of the child's surname. The degree of difficulty involved in changing the name will vary according to the State or Territory in which the stepfamily lives.
8 Seeking guardianship or custody involves working through often complex issues, particularly with respect to the interests and needs of the child and the nature of ongoing parent-child and parent-parent relationships, and thus may be seen as requiring 'undesirable' compromise.
9 The complexity of courts and jurisdictions may be a deterrent. Orders pertaining to guardianship, custody and access following the breakdown of a marriage are made in the Family Court, in accordance with the provisions of the *Family Law Act*. Yet until the amendments to the *Family Law Act* took effect in November 1983, applications for guardianship or custody by a step-parent had to be made in a State court in accordance with the provisions of State legislation. Apart from Western Australia, such State courts are not presided over by judges expert and experienced in matters of family law, with access to an expert counselling service.

The problems and uncertainty associated with the use of 'guardianship' and 'custody' has been recognised in Australia for some time, as has the need for uniform definitions of these terms in State and Federal legislation. The investigation by the Watson Committee, which included among its members a representative of the Social Welfare Administrators of the States, closely examined the meaning of the terms, their use and definition in other countries as well as in Australia. In addition, it consulted with the Conference of Social Welfare Administrators as to the meaning and usage of these terms with respect to State and Territory welfare legislation. Recommendations of the Report of the Watson Committee significantly affected the potential for changes to legislation, both State and Federal, to provide for step-parents a more appropriate means of clarifying and establishing their parental rights and obligations.

This was achieved, in particular, by defining in a clear and concise way the terms 'guardianship' and 'custody' (as set out at the beginning of this paper in the section Definitions). These definitions clearly differentiate between *guardianship* with its concept of 'responsibility for the long-term welfare of

the child', and *custody* with its concept of 'responsibility for the daily care and control of the child'.

The *Family Law Act* has been amended following the Watson Committee recommendation to make it clear that the Family Court has the power to make orders placing children solely or jointly in the guardianship or custody of a person other than a party to the marriage. The Court now has power, in appropriate circumstances, to place a child, for example, in the joint custody of a natural parent and a step-parent with the resulting effect of securing the legal relationship between the child and step-parent, but not severing finally the child's link with the other parent.

Such an amendment is of particular significance because, following passage and enactment in late 1983 of the provisions of the *Family Law Amendment Act* 1983 relating to the definition of 'child of a marriage', a stepchild is once again defined as a child of the marriage (by reason of being ordinarily a member of the household of the husband and wife), and decisions as to guardianship and custody of such a child will be made by the Family Court.

Another recommendation was that the *Family Law Act* be amended to ensure that the name of the child of a marriage is not changed unless by consent of both parents or the agreement of the Family Court.

The Committee's conclusions regarding name changes are regarded as consistent with the policy reflected in the recent amendments to the Queensland *Births, Deaths and Marriages Act* 1962-81 which provides for a change of surname in certain circumstances.

The 1983 amendments to the *Family Law Act* which implemented these recommendations, have now become law (with some minor changes to the wording of 'guardianship' and 'custody'), apart from the name change provisions which were excluded. Such changes in the provision of the *Family Law Act* significantly alter the status of children in stepfamilies — by providing that each of the parties to the marriage is a guardian and has custody of all children of that marriage, including stepchildren. This, in turn, may influence the number of couples who seek to establish the status of step-parents and their stepchildren by means of an adoption order.

The implications for children in stepfamilies

Substantial problems relating to the meaning of, and access to, guardianship and custody orders have until now prevented the widespread use by step-parents. The recommendations of the Watson Committee, as now incorporated into the *Family Law Act*, and if incorporated, where appropriate, into State legislation, would remove such obstacles, thus making guardianship and/or custody a viable alternative to adoption. Legislation could be introduced or amended to provide that adoption by step-parent be permitted only in exceptional circumstances, if at all.

This paper argues that guardianship or custody would meet the basic objectives set out earlier in this paper with respect to the needs of the child.

The initial objectives are to facilitate and strengthen the social, psychological and emotional ties between the child and his or her natural parents and their extended families while enabling the development of close nurtur-

ing relationships between the child and step-parent. An order for guardianship and/or custody would meet this objective in a number of ways by:

- providing for access to the other natural parent and extended family, without severing the child's ties with one half of his or her family;
- maintaining the identity of the child without changing and closing off birth records and the subsequent secrecy and confidentiality;
- encouraging continuing and positive communication between important adults in the child's life which will be beneficial to the child;
- providing for honesty and openness, rather than distortion, of family relationships;
- providing flexibility in allowing for the making of arrangements most appropriate to the needs of the child at a particular age or stage of development.

The final objectives are to clarify and establish in law the legal status and respective rights and obligations of the step-parent and other natural parent. Similarly, an order for guardianship and/or custody would meet this objective by:

- enabling the court to clearly establish the parental rights and obligations to be vested in the step-parent by virtue of the nature of the order it makes, for example, guardianship, custody, or a combination of such rights and obligations;
- maintaining ongoing legal ties between the child and other natural parent and family, establishing those parental rights and obligations which the natural parent will continue to exercise;
- providing for flexibility in terms of the legal arrangements which the court can make in meeting the needs of a particular child.

6 Recommendations for policy and legislative change

It can therefore be concluded that where a step-parent seeks to clarify and establish his or her legal status with respect to a stepchild, the most appropriate means is by use of guardianship and/or custody arrangements. Such arrangements are to be preferred to adoption as a means of meeting the needs of the child and of giving effect to the basic principle underlying both adoption and family law — that the welfare and interests of the child should be the paramount consideration.

To give effect to such changes this paper recommends that policy and legislative changes as outlined below are required.

1 That the States introduce legislation mirroring the provisions of the *Family Law Act* 1975-83 with respect to making orders for guardianship and/or custody in favour of a step-parent.

2 That the States and Territories introduce legislation containing the following provisions:

a That where a step-parent applies to adopt any child of the marriage, the court shall dismiss the application in favour of an application for guardianship or custody unless there are exceptional circumstances.

b That where the application is treated as an application for a guardianship and/or custody order, the court shall, if necessary, transfer it to the Family Court or deal with it under appropriate and parallel State legislation.

c That where the court determines that there are exceptional circumstances which may support the granting of an adoption order

- the court shall grant an adoption order only where it considers that an adoption order would better serve the welfare and interests of the child than an order for guardianship and/or custody;
- the adoption order should be made in favour of the step-parent alone;

d That amendments to relevant State and Territory legislation be introduced incorporating the definitions of 'guardianship' and 'custody' (as recommended by the Watson Committee, or as incorporated in the *Family Law Act*).

3 That State and Territory legislation should provide for a change of surname of a child in favour of that of step-parent provided always that the original entry in the Register of Births is not changed, the consent of both natural parents is given and the child's wishes, where appropriate in terms of age, are taken into account.

4 That written information be provided concerning the making of wills for those step-parents wishing the child to inherit.

5 That in the event of the above changes being incorporated into legislation, comprehensive written information and a general publicity campaign be provided to inform step-parents, and those advising them, of the changes in the law.

List of references

Legislation

ADOPTION Act 1976, England and Wales.

ADOPTION of Children Act 1965-82, New South Wales
1964-83, Queensland
1966-78, South Australia
1968, Tasmania
1964, Victoria
1896-1981, Western Australia.

ADOPTION of Children Ordinance 1965-79, Australian Capital Territory
1964-79, Northern Territory.

BIRTHS, Deaths and Marriages Act 1962-81, Queensland.

CHILDREN Act 1975, United Kingdom.

COMMUNITY Welfare Act 1983, Northern Territory.

FAMILY Law Act 1975, Australia.

FAMILY Relationships Act 1975, South Australia.

Other references

ADOPTION Legislation Review Committee of Victoria (1983), *Report*, Department of Community Welfare Services, Victoria.

Australian Bureau of Statistics (ABS)

ABS – 1979-82, *Adoptions Australia*, Catalogue no. 4406.0.

ABS – 1975-82, *Divorces Australia*, Catalogue no. 3307.0.

ABS – 1975-82, *Marriages Australia*, Catalogue no. 3306.0.

ABS – 1969-72, *Statistics of Adoptions NSW*, Catalogue no. 4401.1.

BISSETT-JOHNSON, Alastair (1980), 'Children in subsequent marriages: questions of access, name and adoption', in Eekelaar, John M. and Katz, Sanford N. eds., *Marriage and cohabitation in contemporary societies: areas of legal, social and ethical change*, Butterworths, Toronto.

BRITISH Agencies for Adoption and Fostering (1981), *Step-parent adoption: a summary*, British Agencies for Adoption and Fostering, London.

CHISHOLM, Richard (1982), 'Child care issues, Aboriginal children and permanency planning: a sceptical view', in Oxenberry, R. ed., *Changing families*, Proceedings of Third Australian Conference on Adoption, Dept. of Continuing Education, University of Adelaide, Adelaide.

EEKELAAR, J.M. (1974), 'Adoption: unconscious discrimination', *Modern Law Review*, Vol. 37, pp. 335, 337-8.

HAMBLY, David (1976), 'Balancing the interests of the child, parents and adopters: a review of Australia adoption law', in Picton, C. ed., *Proceedings of Third Australian Conference on Adoption*, Sydney.

HOUGHTON Committee Report — see under REPORT of the Departmental Committee . . .

MADDOX, Brenda (1975), *The half-parent: living with other people's children*, Andre Deutsch, New York.

OXENBERRY, O. ed. (1982), *Changing families: proceedings of Third Australian Conference on Adoption*, Dept. of Continuing Education, University of Adelaide, Adelaide.

PICTON, C. ed. (1976), *Proceedings of First Australian Conference on Adoption*, [held Sydney], Victorian Standing Committee on Adoption and Alternative Families, Melbourne.

REPORT of the Departmental Committee on the Adoption of Children (1972), HMSO, London. (Generally referred to as the Houghton Report, chairman of the Commitee.)

WALD, Esther (1981), *The remarried family; challenge and promise*, Family Service Association of America, New York.

WATSON Committee of the Family Law Council (1982), *Report: wardship, guardianship, custody, access, change of name*, AGPS, Canberra.